(3)

No. 89-1667

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

Jay Palmer, et al.,
Petitioners,
v.

BRG of Georgia, Inc., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY IN SUPPORT OF CERTIORARI

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The Respondents' Brief In Opposition misstates the record, fails to respond to major conflicts among the Eleventh and other circuits, and fails to acknowledge the lengthy dissenting opinion below, identifying the disagreements in and holdings of the lower court for which the petitioners seek review.

I. THE CONTINUING CONSPIRACY BETWEEN DEFENDANTS BEGAN IN 1980 AND IS "HORIZONTAL," AS THE LOWER COURTS

AND DISSENT RECOGNIZED.

The Respondents' Brief In Opposition flagrantly misstates the nature of this case and the holding below:

> The litigation which the petitioners now seek to have reviewed involves a challenge to respondents' alleged conduct after execution of a new license agreement in 1982. (Brief in Opp. p. 2).
>
> ...
>
> ...The petitioners wrongly assume, or simply assert, that the Eleventh Circuit's opinion addresses relationships between <u>horizontal</u> competitors. (Brief in Opp. p. 5).
>
> ...
>
> The Eleventh Circuit's opinion does nothing more than reaffirm well-established law that <u>vertical</u> arrangements are to be tested under the rule of reason. (Brief in Opp. p. 6).

To the contrary, as the courts below found, the respondents launched their conspiracy to raise price and allocate markets in 1980 when they met privately as direct competitors. The district

court expressly found: "In 1979, BRG and Harcourt competed in Georgia. ... [I]n early 1980, Messrs. Conviser and Pelletier got together. At this time Harcourt was still selling in Georgia." (Pet. App. C-138, 139). Such a finding is based upon HBJ's answer to the complaint, which specifically acknowledges that a horizontal relationship existed.[1] Respondents' argument that their horizontal conspiracy became vertical because it transformed a horizontal competitive relationship into a profit sharing vertical relationship is, as Judge Clark recognized, "simply disingenuous and meritless." (Pet. App.

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[1] The Brief in Opp. (page 3), itself, states that the complaint in this case "made no reference at all to" the 1982 contract modification. Respondents have thus taken inconsistent positions regarding the focus of this litigation.

A-85).

Moreover, the lower court holdings which the petitioners seek to have reviewed are not limited to the 1982 contract. The court below endorsed the legal conclusion that, since "neither the 1980 nor the 1982 agreement explicitly addressed the factor of price" (Pet. App. A-35), the per se rule for price fixing did not apply. The court also endorsed the holding that "neither agreement between BRG and HBJ constituted the kind of market or customer allocation agreement which has been recognized as a basis for per se liability" because "this was not a situation where competitors divided up a market in which both were doing business, each taking a portion of the market," (Pet. App. A-36). As the Justice Department's amicus brief below

asserted, that holding is "wrong as a matter of law, economics, and policy." (Amicus Brief, pp. 2-3). The Court did not delete or modify these holdings, which remain the law of the Eleventh Circuit for future cases.

II. THE CLEAR CONFLICT AMONG THE CIRCUITS CONCERNING THE NEED TO OBTAIN AND SUBMIT STRUCTURAL MARKET DEFINITION EVIDENCE REQUIRES RESOLUTION.

In addition to rejecting the claims of per se liability, the lower courts also rejected the alternative theories of Sherman Act liability -- "rule of reason" section one, and "conspiracy to monopolize" section two. The lower courts held that the petitioners failed to prove relevant geographic and product markets and that such proof was mandatory. (Pet. App. A-45, 46, 55, 59).

As observed in the petition, the

Ninth Circuit recently has held that specific structural proof of market definition is not mandatory in a rule of reason case, E.W. French & Sons, Inc. v. General Portland, Inc., 885 F.2d 1473, at 1404 (1989).[2] The Tenth Circuit has recently held that specific structural proof of market definition is not mandatory in a conspiracy to monopolize case, Monument Builders v. American Cemetery Association, 891 F.2d 1473, 1484 (1989).

Respondents have not addressed these conflicts with the Eleventh Circuit. The question of the necessity of obtaining and evaluating complex economic

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[2] Even more recently the Tenth Circuit has issued an opinion agreeing with the Ninth Circuit on this issue. See, Reazin v. Blue Cross and Blue Shield of Kansas, 899 F.2d 951, 968 fn. 24 (10th Cir. 1990)

structural evidence in these categories of antitrust cases should be resolved authoritatively by this court.

III. THE LOWER COURTS' FAILURE TO ACKNOWLEDGE THE EXISTENCE OF PLAINTIFFS' EVIDENCE IN OPPOSITION TO SUMMARY JUDGMENT REQUIRES SUPERVISION.

Contrary to Respondents' suggestion, the lower courts did not consider and reject plaintiff's evidence submitted in opposition to summary judgment. As Judge Clark recognized, the lower courts simply disregarded the evidence altogether with no explanation. The defendants presented no conflicting theory or evidence of market definition in opposition to the voluminous evidence presented by plaintiffs, which included two expert market surveys, consumer questionnaires, consumer affidavits, and affidavits of economists who had evaluated the data and

market information.

Petitioners urge that this Court not condone the granting of summary judgment in a case involving significant continuing consumer injury when, as the record and the dissenting opinion below make clear, there has been no evaluation by the Court of the evidence in the record. (Pet. App. AS-121-127).

In his annual survey for the Mercer Law Review, a partner at the King & Spalding law firm condemns all aspects of the majority opinion in Palmer, and concludes stating: "...[T]he decision in Palmer, could itself be enough to discourage any potential plaintiff or attorney from bringing an antitrust action in the Eleventh Circuit." See, 1989 Eleventh Circuit Survey, Antitrust, by Michael Eric Ross, to be published

Summer 1990, Mercer Law Review.

This Court has just confirmed that the primary concern of the antitrust laws is to prevent injury to consumers, especially when that injury is caused by an agreement to raise price, as in this case. See. Atlantic Richfield v. U.S.A. Petroleum, ___S.Ct.___, CCH Trade Reg. ¶ 69019 (May, 1990). The opinion below undermines that concern and should not be allowed to stand.

This case may be appropriate for summary reversal and remand. See, e.g., Catalano, Inc. v. Target Sales, Inc., 446 U. S. 643 (1980). (Supreme Court summarily reversed a decision holding that an agreement between beer wholesalers to discontinue selling beer on credit does not constitute per se illegal price fixing).

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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